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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 804

THOMAS S. EISENSTADT,
As he is Sheriff of Suffolk
County, Massachusetts,
APPELLANT,

v.

WILLIAM R. BAIRD,
APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE APPELLEE

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ON APPEAL FROM THE UNITED STATES
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BRIEF FOR THE APPELLEE

The Opinions Below

The opinion of the Circuit Court of Appeals vacating the order of the District Court is reported at 429 F.2d 1398 (1st Cir. 1970) (A. 47). The opinion of the District Court

is reported at 310 F. Supp. 951 (1970) (A. 35). The opinion of the Massachusetts Supreme Judicial Court is reported at 355 Mass. 746, 247 N.E. 2d 574 (1969) (A. 17).

Jurisdiction

The civil action in the United States District Court for the District of Massachusetts was commenced by the filing of a petition for writ of habeas corpus pursuant to 28 U.S.C. sec. 2241 (A. 7). After hearing, the court dismissed the petition (A. 4). Thereupon, the plaintiff (appellee herein) appealed to the United States Circuit Court of Appeals for the First Circuit (A. 12). After hearing, that court on July 6, 1970, vacated the order of the District Court and remanded the action thereto with instruction to grant the writ of habeas corpus (A. 47). Timely notice of appeal was filed with the Court of Appeals for the First Circuit on July 15, 1970 (A. 14).

Probable jurisdiction was noted by this court on March 1, 1971 (A. 6).

Statutes Involved

The Massachusetts statutes involved are Mass. G.L. c. 272, § 21, as amended by Acts of 1966, c. 265, § 3, which provides:

> "Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet,

advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

And Mass. G.L. c. 272, § 21A, as inserted by Acts of 1966, c. 265, § 1, which provides:

"A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

"A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained.

"This section shall not be construed as affecting the provisions of sections twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception; nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles be means of any vending machine or similar device."

Question Presented

1. Is the Massachusetts statute, G.L. c. 272, §§ 21, 21A, unconstitutional on its face as vague, arbitrary, discrimina-

tory, overbroad, or lacking legitimate legislative purpose to the extent that it makes unlawful to give away to unmarried persons medicines and other articles for the prevention of conception?

Statement of the Case

In April, 1967, William R. Baird, the appellee herein, pursuant to an invitation, addressed a group of students at Boston University. Mr. Baird is not a registered physician, a registered pharmacist actually engaged in the business of pharmacy, or a registered nurse. On a demonstration board he exhibited various contraceptive devices and at the close of his lecture he invited members of the audience, with none of whom he had any medical professional relationships, to come and help themselves. He personally handed a young lady a package of vaginal foam. There was no evidence that he knew the woman before-hand. He was thereupon arrested and charged with exhibiting and delivering a contraceptive article (A. 6). The appellee was indicted and convicted of exhibiting and distributing contraceptive devices in violation of Mass. G.L. c. 272, § 21. On appeal, the Massachusetts Supreme Judicial Court unanimously held that the conviction for *exhibiting* contraceptive articles violated Mr. Baird's First Amendment rights. However, by a 4-3 majority, the court upheld the constitutionality of the provision against *delivering* as beyond the realm of free speech. *Commonwealth* v. *Baird*, 355 Mass. 746 (May 1, 1969) (A. 17). On January 12, 1970, the United States Supreme Court denied a petition for writ of certiorari. *Baird* v. *Massachusetts*, 396 U.S. 1029 (1970). Thereafter, a petition for writ of habeas corpus was filed in the United States District Court for the District of Massachusetts (A. 71). Following a hearing, the petition was dismissed with opinion. *Baird* v. *Eisenstadt*, 310 F.

Supp. 951 (1970) (A. 35). A claim of appeal having been filed, the United States Court of Appeals for the First Circuit issued a certificate of probable cause and ordered the appellee herein released on bail (A. 13). After a hearing, the Court of Appeals entered a judgment vacating the order of the District Court and remanded the action with instruction to grant the writ of habeas corpus discharging Mr. Baird, *Baird* v. *Eisenstadt*, No. 7578 (1st Cir. July 6, 1970) (A. 47).

The appellant filed a notice of appeal to this court on July 21, 1970 (A. 14), and on March 1, 1971, this court noted probable jurisdiction (R. 6).[1]

Argument

I. The Massachusetts Birth Control Laws Violate Due Process Of Law In That They Constitute An Unwarranted Invasion Of Privacy.

Although neither the State nor the Federal Constitution refers to a right of privacy in express terms, the principle of safe-guarding private areas of a citizen's life has always been a matter of vital and primary concern.

Article I of the Declaration of Rights in the Constitution of this Commonwealth (pre-dating the United States Constitution), provides in its pertinent part:

> "All men are born free and equal, and have certain natural, essential and unalienable rights; among which may be reckoned the right of ... defending their lives ... and obtaining their safety and happiness."

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[1] It should be noted that the Commonwealth's Statement of Facts incorrectly states that the Appellee personally handed an "unmarried" adult woman the package of vaginal foam.

In *Griswold* v. *State of Connecticut*, 381 U.S. 479 (1965), the Court reviewed cases suggesting that, "... specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance..." (p. 484). The Court went on to explain that although the Constitution nowhere refers to a right of privacy in express terms, the:

> "Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'" (p. 484)

See also, *Beany, the Constitutional Right to Privacy*, 1962 Sup. Ct. Rev. 212; *Griswold, The Right to be Let Alone*, 55 N.W.U.L. Rev. 216 (1960).

In the instant case, we are also concerned with a fundamental right older than the Bill of Rights — older and more cherished even than the marriage relationship. We concern ourselves here with the right to health, to social and economic well-being and, indeed, the right to life itself. The argument of the moralist is no more effective against the unalienable right of the citizen to protect his

health or life, than it was in its assault on the sanctity of the marriage relationship concerned in the *Griswold* case.

This is not to say that the legislature has no right to regulate morals, anymore than the court in *Griswold* was saying that the legislature could not proscribe an act directly and reasonably relating to that purpose. We concede the desirability of regulation that will enhance morals and diminish sexual promiscuity.

The question is: Does this legislation "sweep unnecessarily broadly and thereby invade the area of protected freedom" we speak of here?

> "Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedom."
>
> *N.A.A.C.P.* v. *Alabama*, 377 U.S. 307; *Griswold*, *supra*, p. 484

As we shall see, it is grossly inadequate to argue that we can all agree that the unmarried should not fornicate, and the married shall adhere to their vows. We have statutes providing punishment for those and related misadventures, and those statutes are not under attack here. How compelling is the need for G.L. c. 282, §§ 20, 21 and 21A to the desirable ends above mentioned? To what extent are natural rights interfered with by this legislation — and are the restrictions no greater than necessary to further a proper legislative goal? What immediacy should prompt this Court to exercise judicial intervention with a legislative action? What demonstrably, can we expect to happen if these proscriptions are removed? It is not too

ready and glib an answer to say that all the evils complained of can be avoided by abstinence?

None of these complex questions are easily provided with answers. But some answers are available and we suggest them here.

All authorities agree that statistics and estimates underestimate the full extent of tragic consequences that ensue from illegitimacy. This is due in part from the recognizable fact that many illicit pregnancies are not reported, especialy amongst middle and upper class income groups and the apparent reluctance of some agencies to cooperate with those who have an interest in gathering data. Responsible studies, however, have been made that give some insight into the problems that arise. All of these studies clearly illustrate the tragic result to the unwed mother, the unwanted child, and the enormous cost, both social and in dollars to the community. (The cost to the male counterpart responsible for these unwanted pregnancies, does not appear to have been the subject matter of any extensive study. It is only reasonable to speculate, however, that there are related consequences substantially out of proportion to the illicit behavior they have engaged in.)

With no intention to suggest a canvass of all available materials, some representative summaries of pertinent data follows:

A. *Is "Abstinence" an Adequate Answer?*

The danger to health and life that is encouraged by the continued operation of our proscription on information and availability of contraceptives is not answered by shouting "abstinence". That answer was either not explained, heard or understood by the unwed mothers who bore

275,000 unwanted children in 1964[2] of which 50,000 were born to mothers in the 17 years of age or under group.[3] In 1965, the estimated number of ilegitimate births rose to 291,000, with over 40% being borne by unwed mothers in the 15-19 year age group.[4] Between 1940 and 1965, the estimated total of illegitimate births in the United States more than tripled, and "even if the illegitimacy rates remain constant at their 1965 levels, the number of illegitimate births would increase from an estimated 291,200 in 1965 to 403,000 by 1980.[5]

B. *Maternal Mortality*

In a study made of the five-year period from 1955 through 1959 in the New York City area, the death rate was approximately four times as great for the unmarried as for the married.

The puerperal death rate for the unmarried whites was nine times as great as for the married whites. The higher puerperal death rate was attributed to the much higher incidence of illegal abortions among the unmarried.[6]

C. *Infant Mortality*

The death rate for infants born out-of-wedlock was more than twice as high (48.2 per 1000 live births) as that for infants born in-wedlock (23.9 per 100 live births). Although fetal deaths were not included in this study, avail-

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[2] deRonge, Alberta: mimeograph. Connecticut Department of Health, State of Connecticut, Hartford, 1965, pp. 1, 12.

[3] Wallace, Helen M.: Am. J. Obst. & Gynec. 92:1125, 1965.

[4] Trends in Illegitimacy, U. S. Department of Health, Education and Welfare, Public Health Service, National Center for Health Statistics, Series 21, No. 15, p. 7.

[5] Id. pp. 8, 10.

[6] American Journal of Public Health, Vol. 51, No. 6, p. 851.

able data on a sample basis, indicated a significantly higher rate of late fetal deaths among the unmarried.[7]

D. *Health Characteristics*

Illegitimate children are not only stigmatized socially by their legal status, but they also suffer handicaps with respect to the physical development at birth and their subsequent health. This has been demonstrated by studies conducted in New York City and can be shown in two health related characteristics that the reported uniformly on the birth certificates in all states: the birth weight of the child and the attendant at the birth and place of delivery.[8]

E. *The Cost to the Community in Dollars*

Even the computerized era that we live in cannot accurately calculate the dollar cost resulting from unwanted pregnancies. The outer limits of the problem is suggested, however, by a Kansas City study projected over a twenty-year period that estimated that progeny resulting from 100 unmarried pregnant adolescents would amount to ten million dollars.[9]

These fantastic figures were more recently supported in a study made jointly by the Yale University School of Medicine and the Yale-New Haven Medical Center, who followed 100 unwed patients, age 17 or less, who were delivered of their first child at the Yale-New Haven Medical Center between January 1, 1959 and December 30, 1960: "Our 100 girls have had 340 babies in only five years. The

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[7] Ibid, p. 857.

[8] Trends in Illegitimacy, (1940-1965), supra, p. 17.

[9] The Adolescent Unwed Mother, Jeffries, J. E. Editor: Ross Roundtable on Maternal and Child Nursing, Columbus 1965, Ross Laboratories.

average girl in this group still has over twenty years of potential reproductivity remaining.'"[10]

F. *The Unwanted Child*

We have dealt up to now mostly witht he impact of the statutes upon the parents. But the children produced by virtue of the Massachusetts statutes must be considered too. The plight of the unwanted child, and its social consequences, have been well stated by Dr. Karl Menninger:

> "Far more important than the dramatic examples in which the hostility of a mother ruins the life of an unwanted child, are the more general effects of repressed maternal hatred. Where one child reacts to this with an acute mental illness, dozens of children react to it in more subtle ways by developing self-protective barriers against the inner perception of being unwanted. This may show itself in a determined campaign or in a provocative program of attracting attention by offensive behavior and even criminal acts. Still more seriously it may show itself as a constant fear of other people or as a bitter prejudice against individuals or groups through deep-seated, easily evoked hatred for them. The rage of the southern poor white against the Negro suspected of some dereliction is referable to the hate he feels inwardly at having been himself, like the Negro, unwanted. The same is perhaps true in the case of Germans and Jews and in many other situations which give opportunity for the expression of hatred in the denial of the feeling of being rejected. The importance

[10] The Young Unwed Primipara, Am. J. Obst. and Gynec., Vol. 95, No. 5, p. 727 (1966).

of this factor in the psychology of war is even greater, in my opinion, than the economic factor arising from the increase in population. This is why I say that from the purely scientific point of view, planned parenthood is an essential element in any program for increased mental health and for human peace and happiness. *The unwanted child becomes the undesirable citizen, the willing cannonfodder for wars of hate and prejudice. . .*" [11] (Emphasis supplied)

G. *Will the Availability of Contraceptives be Effective in Diminishing These Evils?*

Both the Kansas City Study [12] and the scholarly work conducted by Yale University and the Yale-New Haven Medical Center [13] conclusively demontrate the marked degree of recidivism amongst unwed mothers. It can reasonably be inferred that undesirable effects resulting from primary transgressions of the moral code will diminish with the availability of contraceptives and the concomittant education and instruction in use.

"The critical role that contraception can play in rehabilitation of the unwed mother is stressed." [14]

H. *How Compelling is the Need for this Legislation?*

(1): We have previously conceded the desirability of legislative enactments designed to enhance morals. To that

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[11] *Love Against Hate* (1942, p. 224). See also Coghill, *Emotional Maladjustments from Unplanned Parenthood*, 68 Virginia Medical Monthly 682 (1941). Jenkins *The Significance of Material Rejection of Pregnancy for the Future Development of the Child*, in Rosen *Therapeutic Abortion* (1954), p. 269.

[12] See Footnote No. 8.

[13] See Footnote No. 9.

[14] See Footnote No. 9.

end, we accept, for this day, any direct statutory proscription on enumerated sexual behaviors.

Is it the public policy of the Commonwealth, however, to permit the ills of unwanted pregnancies to spread unchecked *among those who indulge in illicit sexual intercourse?* In *Commonwealth* v. *Corbett*,[15] 307 Mass. 7, the Court declared that ". . .it does not appear to be any part of the public policy of the Commonwealth, as declared by the legislature, to permit venereal disease to spread unchecked *even among those who indulge in illicit sexual intercourse*. . ." (Emphasis supplied)

". . .The social gain from the deterrence achieved is not worth the tragedy of unwanted pregnancy or venereal disease in the cases in which the statute fails in the purpose; and to prescribe such pregnancy or disease as punishment in illicit intercouse would be a monstrous thing. I cannot attribute that scheme of values to the legislature." *Weintraub, C.J., State* v. *Baird*, 50 N.J. 376, 37- (1967).

In *Corbett, supra*, the Court recognized that people either inadvertently or intentionally become wayward. The Court wisely refused to turn its head from harsh realities and, notwithstanding the moral consideration inherent in how venereal disease was contracted, articulated public policy in the absence of legislative fiat. It is true that the Court found it unnecessary to invalidate the law to correct the evil, and only had to reason that the forbidden article was sold to prevent disease and not "for the prevention of conception" to accomplish an obviously desirable result.

If this Court was now seeking a similar cure, this appellee would have to be content, for example, with a reversal of his conviction on a factual basis that his exhibition and distribution was not "for the prevention of contraception," but instead was "for the purpose of testing the law." Such

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[15] For additional discussion on *Corbett* case, See Argument No. II.

an obviously patent artifice, however, is not seriously suggested; the Court should have little difficulty in observing the imbalance between legislative intent and individual and community harm.

In addition, we prefer to believe that our legislature is not so unfeeling as to disagree that the punishment of an unwanted pregnancy is a monstrous thing—and must conclude that it did not take into account the foregoing ills when enacting and amending the statutes here in question.

(2) It would appear that preventing conception, per se, is not immoral — at least in a legal, as distinguished from a religious sense.[16] The most conservative prevailing religious view is expressed in the recent Vatican Encyclical, *Humanae Vitae,* but, even the staunchest advocate would be hard pressed to suggest that pronouncement by the Holy Father has received universal or even widespread acceptance by Roman Catholics.

One may more than just muse over whether there remains any substantial moral issue involved in the prevention of conception — and wonder if it isn't the moralists (in their point of view), rather than morality, who most stand to lose. "Moralists (Legislatures) may have to pronounce upon these questions, but woe to the world if, when they are consulted, they cannot agree among themselves."[17] Is there that kind of majority opinion regarding these statutes to justify their continuance? Does a moral system that is soundly and firmly based on the golden rule, need to be affected if we abolish these laws? Cannot we articulate an acceptable moral code and rephrase the laws to prevent sprinkling contraceptives throughout the schoolyard, without closing our eyes to the wretched effects of un-

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[16] *Griswold*, supra.

[17] Canon Tiberghian.

wanted pregnancies? Any moral taboo which operates to preserve an outdated concept of what is obscene or what is necessary or desirable to prevent promiscuity, merely to pacify or sooth deeply ingrained prejudices, can only operate to hurt the community it purports to protest. Any attempt to endorse such taboo with authority of the Deity does not change the facts and does little to cover them up.

The problem of defining morals and prescribing or proscribing conduct that will enhance them is probably an endless one. That fact only highlights the necessity for this Court to closely scrutinize any legislation which cannot quickly be demontrated as a reasonable means to accomplish that end sought by our lawmakers.

To all of this, the Commonwealth must argue that in some way the statutes do more good than harm and that all the recited ills can be avoided by the simple expedient of abstinence. But, is the answer really that simple? We can go back to Adam and note the lost battle by the first man in forebearing the forbidden fruit.

For the knowledgable and informed who premeditatedly break the moral code, the failure to have readily available a contraceptive device can be frighteningly severe; for the uneducated[18] or poverty stricken[19] married, the

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[18] Although Section 21A provides limited availability to married persons, it specifically discourages education of use and availability: "This section shall not be construed as affecting the provisions of Sections twenty and twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or contraception; . . ."

[19] Many contraceptives, e.g., intra-uterine devices, diaphragms, oral contraceptives, require medical consultation and prescription. Section 21A's requirement, however, that married persons make a trip to their physician to obtain a condom or prescription for foam makes about as much sense as requiring a trip to the doctor's office to purchase toothpaste or aspirin tablets.

penalty for failing to abstain is pitifully unnecessary; for the wayward, ignorant or mislead Eve, the penalties are tragic; for the unwanted child the penalties can be cruel; for the unwitting, non-participating community, any penalty is mis-applied and points out the incongruity in suggesting that community welfare is served by the challenged statutes.

Any or all of these penalties can only be avoided at the price of abstinence. That price imposes an intolerable choice (or chance) which the Commonwealth has no power to demand.

In addition to an M.D., Section 21A permits only ". . . A registered pharmacist actually engaged in the business of pharmacy . . ." to furnish a contraceptive to a married person.

These apparently unnecessary stringent requirements suggest questions that may be pertinent to whether Section 21A is reasonable regulation conforming to the mandate of *Griswold*. Has experience indicated that doctors and pharmacists, prior to the enactment of Section 21A, have been judicious in prescribing and selling contraceptives solely "for the prevention of venereal disease" and thereby are entitled to an entrusted status in the keeping of morals Are the doctors and pharmacists expected to keep records of prescriptions that will be helpful to future legislation, or will in some way provide for a check on our moral health? Since "everything costs more in a drug store" (common knowledge) was the statute designed as a covert way of discouraging use in order to soothe the feelings of the moralist? Do the requirements manifest the interest of the purveyors of contraceptives, as suggested by Weinraub, C.J. in *State* v. *Baird*, 50 N.J. 376 (1967) in footnote 1., p. 381.

> "I cannot forget what I believed was the situation when I was concerned with this problem as a member of the Bar. I believed then that the opposition to the vending machine sale was stimulated by manufacturers of condoms whose outlet was the drugstore. The condom was always obtainable; the difference was that the drugstore price was 300 percent of the vending machine figure. The dispute was over price and profit."

At any rate the legislature does seem bent on making matters much more difficult for the married to honestly enjoy their cherished rights than for the unmarried to suffer the penalties for their waywardness. The married must go to a doctor and get a prescription; the unmarried can go in and, with the most undetectable of lies assert his purchase is solely "for the prevention of venereal disease." Does this not fairly lead one to question the "wisdom" of the legislature.

II. THE MASSACHUSETTS BIRTH CONTROL STATUTE (G.L. c. 272, s. 21) DENIES THE DEFENDANT THE RIGHT TO LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW IN THAT IT IS ARBITRARY AND CAPRICIOUS, AND HAS NO REASONABLE RELATION TO A PROPER LEGISLATIVE PURPOSE.

A. *The Standard of Due Process to Be Applied.*

In *Griswold* v. *State of Connecticut*, 381 U.S. 479, the United States Supreme Court reaffirmed the requirements of the due process clause expressed in *Myer* v. *Nebraska*, 262, U.S. 390 (1923) as follows:

> "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts." (Pp. 399-400)

Although *Griswold* concerned itself with the "use" of contraceptives within the hallowed privacy of the marital relationship, the majority opinion made clear its intention to repudiate unreasonable state legislation which concerned itself with zones of privacy created by fundamental constitutional guarantees.

> "Such a law cannot stand in the light of the familiar principle, so often applied by this court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly

and thereby invade the area of protected freedom'. *N.A.A.C.P.* v. *Alabama*, 377 U.S. 288, 307." *Griswold* v. *State of Connecticut*, *supra*.

The fundamental rights involved, in the instant case, are those of an individual to give and receive advice and articles concerning harmless methods and approved means for preventing the undesirable legal, social, economic, psychological, and other far-reaching and attendant effects resulting from an unwanted pregnancy or children.

In *Meyer* v. *Nebraska*, *supra*, the court was concerned with legislation touching upon a right of a fundamental, individual and personal character, essential to maintaining the independence, integrity and private development of a citizen in a highly organized, yet democratic, society. The concern of the court, however, has not been limited to application of due process standards solely to rights that are individual and personal in character. In a long line of cases the courts have been fit to review both Federal and State legislation that concerned itself solely with economic regulation. *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937); *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *Berman* v. *Parker*, 348 U.S. 26 (1954); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955).

In *Nebbia* v. *New York*, 291 U.S. 502 (1934) the court restated the requirements of the due process clause, although upholding the validity of a statute regulating a commercial enterprise:

"If the laws passed are seen to have a *reasonable* relation to a proper legislative purpose, and are neither aribtrary nor discriminatory, the requirements of due process are satisfied, ..." (p. 537) (emphasis supplied)

The Massachusetts court has seen fit to reject legislation having to do with economic regulations that are shown to be arbitrary and capricious. In *Coffee-Rich, Inc.* v. *Commissioner of Public Health*, 348 Mass. 414 (1965) the court stated as follows:

> "It seems to us that the defendant's reasons for attempting to prohibit the sale of Coffee-Rich are more fanciful than real. . . . there is nothing in the record to suggest that such deception by common victualers or institutional users prevails or even exists in Massachusetts 'legislative regulations must be reasonable in their nature, directed to the prevention of real evils and adapted to the accomplishment of their avowed purpose. Under the guise of protecting the general welfare there cannot be arbitrary interference with business or irrational or unnecessary restriction' *Opinion of the Justices*, 247 Mass. 589, 595-596, 143 N.E. 808; *Sperry & Hutchinson Co.* v. *Director of the Div. on the Necessaries of Life*, 307 Mass. 408, 425, 30 N.E. 2d 269."

Although it would appear the courts have been prone to permit legislators a large degree of judgment with regard to economic regulation, they have at the same time subjected to much more intensive scrutiny, under due process, legislation which impairs the freedom of the individual to live a fruitful life or to exercise his own judgment as a citizen rather than as a subject. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), *Wieman* v. *Updegraff*, 344 U.S. 183 (1952), *Slochower* v. *Board of Bar Examiners*, 353 U.S. 232 (1957), *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964).

The statute involved in the instant case plainly falls within the latter category. We are not herein concerned

with the restriction of a commercial activity, even though, as illustrated above, that type of regulation can be subject to scrutiny by this court. What is involved, is this appellee's right to disseminate information and to distribute a safe and medically approved article[20] to those members of the community who seek to exercise their own judgment on a subject matter that clearly concerns them privately and neither affects detrimentally the general welfare of the community (other than in a manner supportive of the Commonwealth's position) nor is reasonably related to a valid legislative purpose.

There is nothing in the record of this case that can lead to the inference that the appellee's actions were detrimental to the public's health, welfare or morals.

> "That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected." *Meyer* v. *Nebraska,* supra (p. 401)

The standards imposed on State Legislatures by the due process clause may be summed up therefore as (1) having a reasonable relationship (2) to a proper legislative purpose (3) and not otherwise arbitrary or capricious.

B. *Objectives of the Massachusetts Birth Control Statutes*

In order to apply the standard of due process, it is first necessary to determine what objectives were sought to be achieved by the legislature. In doing this, we will briefly

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[20] Condoms, vaginal foam, etc., are considered non-prescriptive articles. See "Modern Methods of Birth Control", Appendix, 46-48.

review decisions of that court that have previously dealt with the propriety of this legislation.

> "The Provisions of General Laws (Ter. Ed.) c. 272, S. 21, first appeared in St. 1879 c. 159, in substantially the same words as are now used. That was the earliest enactment in this Commonwealth respecting the prevention of conception, in framing legislation under the police power. The legislature, without any denial of rights under either the State or the Federal Constitution, might take the view that the use of contraceptives would not only promote sexual imorality but would expose the Commonwealth to other grave dangers . . ." *Commonwealth* v. *Gardner*, 300 Mass. 372 (1938).

Although all of the Massachusetts cases have consistently taken the view that this legislation is designed to improve the public morals and prevent "sexual immorality", the defendant is otherwise at a loss to even begin to understand what "other grave dangers", in the words of the *Gardner* case, can be reasonably apparent in this enlightened day and age. With all due respect for the necessity to engender and encourage "morality", in accordance with whatever definition of morality one might want to propose, it is difficult to see that our birth control statutes validly accomplish that end.

Speaking of the instant statute in 1917, the Court said:

> "Their plain purpose is to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus to engender in the state and nation a virile and virtuous race of men and women . . ." *Commonwealth* v. *Allison*, 227 Mass. 57.

Although such a noble purpose must always be respected, any proponent of this legislation must find himself hard-pressed to substantiate a reasonable relationship between the operation of the statute and its purported aim. In *State of New Jersey v. William R. Baird,* 50 N.J. 376 (1967), Weintraub, C.J., in a concurring opinion stated:

> "We, however, have no statute making contraception illegal, unless the statute now before us is read to say so by implication, and no one wants to go that far. No other statute says a party guilty of illegal intercourse is guilty of a further offense because he or she avoided pregnancy. And if it suggested the legislature meant to impede illicit intercourse rather than to illegalize conception as such, I could not accept that view of the legislative intent. That thesis would assume the legislature intended pregnancy (and venereal disease as to such contraceptives as also to protect against it) to serve either as a resraint upon illicit affairs or as punishment for them. In my view, the social gain from the deterrence achieved is not worth the tragedy of unwanted pregnancy or venereal disease in the cases in which the statute fails in the purpose; and to prescribe such pregnancy or disease as punishment in illicit intercourse would be a monstrous thing. I cannot attribute that scheme of values to the legislature." *Id.*

It would appear that this court, in its prior decisions, has approved of that "scheme of values", at least insofar as there is merit to the contention, suggested by the defendant, that illicit affairs are increasingly resulting in the tragedy of unwanted births.[21] It is suggested, however, that

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[21] See Argument No. 1.

in the light of present day data and contemporary scientific and social thinking that this court should find merit in taking another look at that which it has previously condoned.

The court took a peek at previously approved values, in 1940, when it decided *Commonwealth* v. *Corbett*, 307 Mass. 7.

Recognizing that the continued blanket prohibition of the use of contraceptives was resulting in serious harm to the community, the court saw fit to close its eyes, to to speak, to the noble purpose it enunciated in *Commonwealth* v. *Allison, supra,* and reversed in *Corbett,* the conviction of one found guilty who sold a contraceptive "for prevention of disease." With what today must be regarded, in the light of the ready availability of contraceptives, as tongue in cheek, the court said in *Corbett, supra,* "it is clear that the public policy of the Commonwealth, as declared by the legislature, is offended by the sale of articles intended to prevent conception. Recognizing some change in the legislative scheme of values the Court concluded in *Corbett,* ". . . it does not appear to be any part of the public policy of the Commonwealth, as declared by the legislature, to permit venereal disease to spread unchecked *even among those who indulge in illicit sexual intercourse.* It is now recognized that venereal disease cannot be confined to the guilty, but may afflict innocent wives, or husbands, innocent children in whom it is congenital, and innocent victims of contact with diseased persons or the germs of disease apart from sexual intercourse. Statutes show that the policy of the Commonwealth is to endeavor to check the spread of venereal disease . . ." (emphasis supplied).

The Appellee submits that in 1968 science has come a long way in checking the occurrence and spread of venereal disease. The larger problems today, as will hereinafter be discussed, are the social and economic results of unwanted

pregnancies and births. The importance of the *Corbett* decision to the position taken by this defendant is that even though *Corbett's* conviction was reversed, upon the narrow view that he was not selling "for the prevention of conception," the court recognized that there are limitations to blanket proscriptions of behavior that are based upon the standards of morality.

When legislation is designed to promote health, safety, or the general welfare in a material sense, its validity under the due process clause can be tested by considerations that can be objectively determined and rationally weighed. Whether a statute is arbitrary or capricious, or has a reasonable relation to a proper legislative purpose, turns in such cases upon factual material which can be discovered and presented to the court in a fashion exemplified by a Brandeis brief.

When legislation is designed to promote public morality, however, the problem of applying the standards of due process must necessarily take a different form. Moral purposes are more easily understandable in the direct prohibition of fornication, adultery and other statutes where the sexual act is of direct consideration. In this case, however, the legislature has sought to legislate purely on the basis of moral principles, enumerated in the *Gardner* and *Allison* cases, not subject to objective evaluation. In such a case how are the standards of due process to be applied?

Certainly the court cannot take the position that the simple claim of a moral aim by the proponent of the legislation satisfies the requirements of due process and requires that this defendant be suffered with the burden of showing little or no connection between the statute and its avowed purpose. In *Poe* v. *Ullman*, 367 U.S. 545, , Mr. Justice Harlan said, "the mere assertion that the action of a state finds justification in the controversial realms of morals cannot justify alone any and every restriction it imposes." *Id.* at 551. Any such doctrine would immunize virtually all

legislation from the mandate of the due process clause. It would allow the legislature to impose restraint upon individual liberties solely on the ground that some fraction of the community regarded the issue as a moral one. If we followed this kind of thinking, it could well be argued that the mini-skirt is responsible for a greater amount of immorality than the availability of contraceptive articles.

We submit that the constitutional standard for applying due process in cases where the legislature seeks to promote public morals requires that the *specific* moral practice, e.g. exhibiting or distributing contraceptives, regulated by the statute must be objectively related to the public welfare. We shall illustrate the converse of such relationship in Sections C through G., Infra. In the event no such relationship can be demonstrated, the regulation must at least conform to the predominant view of morality prevailing in the community (the proscription of fornication, adultery, etc.). In other words, if the legislature cannot establish that the law promotes the public welfare in a material sense, it cannot enforce the morals of a minority group in the community, upon other of its members.

The doctrine we urge here is fully supported by the obscenity cases. In *Roth* v. *U. S.*, a majority of the court held that the material alleged to be obscene could not be restricted unless it met the standard that "*to the average person, applying contemporary community standards,* the dominant theme appealed to prurient interest." 354 U.S. 476, 489 (1957). This standard was more recently confirmed in *John Cleland's Memoirs of a Woman of Pleasure* v. *Attorney General of the Commonwealth of Massachusetts,* 383 U.S. 413 (1966).

We submit that this Court should not recognize as a contemporary community standard that one who commits an illegal act of intercourse should be forced to do so without the use of contraceptive. To support that view by making

reference to the apparent "wisdom" of the legislature, is to merely beg the question. If a Court was willing to take judicial notice in 1940 of the widespread ill effects of permitting venereal disease to spread unchecked, it should have no difficulty today in declaring the undesirability of permitting the widespread ill effects of unwanted pregnancies and births.

In *Commonwealth* v. *Gardner*, supra, the Massachusetts Court advanced the view that the use of contraceptives "would promote sexual immorality." In the *Corbett* case, that Court recognized that the evil of venereal disease permitted the sale of contraceptives but "solely for that purpose." Accordingly, it would appear that this defendant, or any other person, could appear before a group of seventeen hundred students at Boston University, display or exhibit contraceptive devices, distribute them at will and tell them with tongue prominently displayed in cheek that they are to be used solely for the prevention of venereal disease. We condone the prevention of one illness and prohibit even speaking about far greater matters of public welfare and concern. If is that kind of hypocrisy that goes far toward encouraging youth to pay little attention to the teachings of their elders.

It would appear that at a time when honesty, instead of hypocrisy, would provide the most effective means of communicating with the youth of today,[22] that the operation of this statute and its continued approval by the courts would go far towards demolishing that desirable means of communication.

We ask this court to take notice of the fact that any adult, or adult-appearing youngster can walk into every drugstore in the Commonwealth of Massachusetts and pur-

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[22] We submit that today's young adults are far more responsible than alarmists would have us believe. (Hippies and Yippies notwithstanding).

chase a condom without being asked if it is to be used solely for the prevention of disease. It is farcical to say that the druggist is protected from violating this statute because it somewhere appears on the container that the condom is to be used solely for the prevention of disease. We ask this Court to note the wide variety of respectable women's publications that advise the sale throughout the country of Emko and other vaginal foams that have as their sole utilitarian purpose the prevention of conception and the fact that any male or female adult or one who appears to be an adult can walk into most drugstores or supermarkets in the Commonwealth and purchase said vaginal foam without prescription.

That this practice, illegal though it be, is in conformity with the contemporary community standards is witnessed by the fact that the defendant has been unable to discover any prosecution arising out of the sale or distribution of vaginal foam and no prosecution in at least the last twenty years for the sale or distribution of the condom.[23]

In the regard now under consideration the remarks of Justice White in *Griswold* v. *State of Connecticut, supra,* appear to be particularly appropriate. Although that case concerned itself with the use of contraceptives within the

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[23] On September 6, 1968 the Boston Municipal Court refused to issue complaints in the following cases: Application for Complaint No. 5469 charging that John M. Finlayson, an employee of Raymonds Dept. Store in Boston, exhibited Emco foam on September 5, 1968; on Application for Complaint No. 5470 that one Herbert Simmons, an employee of "Big L Health and Beauty Aid Store" at 366 Washington Street, Boston on September 5, 1968 did sell a container of Emko vaginal foam and on Application for Complaint No. 5471 that an employee of Jordan Marsh Co. on September 5, 1968 did offer for sale a magazine, to wit: "Mademoiselle", containing an advertisement for Emko vaginal foam. On all three Applications a hearing was held before the Chief Justice of the Boston Municipal Court, Adlow, J. Although the hearing was not reported, all of the Applications for Complaint were denied even though witnesses were heard who established the facts of exhibition, sale and advertising.

marital relationship, Justice White's remarks are equally appropriate in opposing the view that the use of contraceptives promotes sexual immorality.

> ". . . Indeed, after over eighty years of the state's anti-use proscription, the legality of the sale of such devices to prevent disease has never been expressly passed upon, although it appears that sales have long occurred and have only infrequently been challenged. This 'undeviating policy . . . throughout all the long years . . . bespeaks more than prosecutorial paralysis' . . . .
>
> "In these circumstances one is rather hard pressed to explain how the ban on use by married persons in any way prevents use of such devices by persons engaging in illicit sexual relations and thereby contributes to the state's policy against such relationships. *It is purely fanciful to believe that the broad proscription on use facilitates discovery of use by persons engaging in a prohibited relationship or for some other reason makes such use more unlikely and thus can be supported by any form of administrative consideration.* Perhaps the theory is that the flat ban on use prevents married people from possessing contraceptives and without the ready availability of such devices for use in the marital relationship, there will be no or less temptation to use them in extramarital ones. . . . At most the broad ban is of marginal utility to the declared objective. A statute limiting its prohibition on use to persons engaging in the prohibited relationship would serve the end posited by Connecticut in the same way, and with the same effectiveness, *or ineffectiveness* as the broad anti-use statute under attack in this case. . . ." (emphasis supplied) (pp. 506, 507)

C. *An objective of the statutes to restrict sexual intercourse to the propagation of children would not be a proper legislative purpose.*

Neither the legislature of the Commonwealth of Massachusetts nor the Massachusetts court, in reviewing the pertinent statutes, has ever explicitly stated that an objective of the birth control statutes has been to restrict sexual intercourse to the propagation of children. The idea, however, may be implicit in the statement of that court to the effect that "their plain purpose is to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus engender in the state and nation a virile and virtuous race of men and women. *Commonwealth* v. *Allison, supra,* and otherwise may be implicit in the "other grave dangers" that the court indicated the legislature may have considered in proscribing the use of contraceptives. *Commonwealth* v. *Gardner, supra.*

If it be an objective of the law to restrict sexual intercourse to procreation, either by the blanket proscription of contraceptives to the unmarried, or the narrow and unreasonable restriction of contraceptives under §21A to those who are married, then we submit this is not a proper legislative purpose under the requirements of the due process clause.

Such a legislative purpose would contravene the approval to use contraceptives contained in Section 21A and thus be in violation of what has been recognized since 1966, even in the Commonwealth of Massachusetts as an invasion of individual privacy that is not property within the police power of the state to either promote morals or general welfare.

In addition, such legislative approach would be incongruous in view of the undisputed fact that it is the wayward who is most likely to procreate through the proscription of contraceptives.[24]

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[24] See Argument Nos. 1, supra.

In any event, this Court should not accept such a drastic view of the law without a much more clear-cut statement from the legislature that the statutes were designed to accomplish this end.

D. *Extrinsic Aids to Avoid Conception are not Objectively Related to the General Welfare.*

It is the virtually unanimous opinion of all branches of the medical profession that the use of extrinsic articles of contraception are not harmful to the individual either on physical or psychological grounds. The widespread use of such devices by physicians is in itself sufficient evidence of this opinion.[25]

In *Griswold* v. *State of Connecticut, supra,* although the Court was considering actions that were approved by a licensed physician and professor at the Yale Medical School, that fact never appeared to be material to the question in issue. Although the qualifications of the defendant herein have not been made a part of the record, this Court might nonetheless be receptive to inferences which can reasonably dispel any notion that he is a Charlatan.

Since the enactment of G.L. C. 272, S. 21A, a hurried attempt to comply with the *Griswold* case, contraceptive devices, albeit with exceptions, are legally prescribed and used in all states of the Union. The appellee can well understand the necessity for expertise in instructions on use for some contraceptive articles, e.g., intra-uterine, diaphragm, or related devices, but points out that the distribution of articles in the instant case consisted only of those that are unanimously considered to be non-prescriptive in nature and that the Massachusetts Statutes fail to acknowledge the fact that condoms and foams do not require the approval of a medical expert. Moreover, it can-

[25] Guttmacher, *Conception Control and the Medical Profession*, 12 Human Fertility 1, 2-3 (1947).

not be argued, other than in a tenuous concept of morality, that the use of a contraceptive itself results in any injury.

E. *The Prohibition Against Using Extrinsic Aids to Avoid Conception Does Not Conform to the Predominant View of Morality Within the Community.*

Whatever the predominant community sentiment may have been in the latter half of the 19th century when these statutes were enacted, there can be no doubt that *Griswold* v. *State of Connecticut*, supra, has recognized that marital privacy cannot be interfered with by legislative views regarding the use of contraceptives.

It is not necessary to condone immorality in order to recognize that the predominant, prevalent present day thinking is opposed to the damning, devastating and tragic consequences[26] that result from the proscription of contraceptives to the wayward. The most recent poll of the American Institute of Public Opinion (The Gallup Poll), published on September 1, 1968, reveals that among the Catholic community questioned, 76% of them felt that birth control information should be available to anyone who wants it. Only 17% were opposed, and 8% had no opinion.[27] Among the Protestant members of the community, 75% of those questioned felt that birth control should be available to anyone who wants it. Only 19% were opposed and 6% had no opinion.[28]

1. *The opinion of the medical community.*

The very general prescription of contraceptive devices in medical practice has already been pointed out. It is

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[26] See Argument No. 1, infra.
[27] Boston Sunday Globe, September 1, 1968. Also see Appendix,
[28] Ibid.

hardly likely that such an overwhelming proportion of a profession, so highly regarded by the public, would advise or employ methods considered morally reprehensible by the prevailing opinion of the community.

In the joint study by the Yale University School of Medicine and the Yale-New Haven Medical Center cited in Argument No. 1, *infra*, the doctors in charge of the study concluded:

> "The critical role that contraception can play in rehabilitation of the unwed mother is stressed." (p. 724)

2. *The attitude of the religious community.*

a. *Protestant.* Among Protestant groups opinion is almost unanimous that the use of extrinsic aids to avoid conception is morally justified in at least the privacy of the marital relationship. Indeed some groups hold that proper limitation of families, by medically approved methods, may be considered a religious obligation. We cite only a brief sampling of this opinion:

The Lambeth Conference of Bishops of the Anglican Communion, representing 40,000,000 communicants including members of the Protestant Episcopal Church in the United States, adopted the following resolution in 1958:

> "The Conference believes that the responsibility for deciding upon the number and frequency of children has been laid by God upon the consciences of parents everywhere; that the planning, in such ways as are mutually acceptable to husband and wife in Christian family life and should be the result of positive choice before God."[29]

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[29] The Lambeth Conference, 1968, S.P.C.K. (1958) p. 1:57.

The General Assembly of the United Presbyterian Church, in 1959, made a similar declaration:

> "The 17th General Assembly
>
> "Approves the principle of voluntary family planning and responsible parenthood,
>
> "Affirms that the proper use of medically approved contraceptives may contribute to the spiritual, emotional and economic welfare of the family,
>
> "Urges the repeal of laws prohibiting the availability of contraceptives and information about them for use within the marriage relationship . . ."[30]

The Council for Christian Social Action, United Church of Christ, comprising the Congregational Christian Church and the Evangelical and Reformed Church, in 1960 stated its position as follows:

> "Responsible family planning is today a clear and moral duty. We believe that public law and public institutions should sanction the distribution through authorized channels of reliable information and contraceptive devices. Laws which forbid doctors, social workers and ministers to provide such information and service are infringements of the rights of free citizens and should be removed from the statute books. Any hospital which receives public funds should permit doctors to provide all services they consider necessary."[31]

And the National Council of Church of Christ in the United States of America issued the following statement:

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[30] Quoted from Planned Parenthood News, Spring, 1959.
[31] 26 Social Action, No. 8 (April 1960), pp. 24-7.

"Most of the Protestant churches hold contraception and periodic continence to be morally right when the motives are right. They believe that couples are free to use the gifts of science for conscientious family limitation, provided the means are mutually acceptable, non-injurious to health, and appropriate to the degree of effectiveness required in the specific situation."[32]

In Connecticut, the Connecticut Conference of Congregational Churches at its 95th annual meeting in October, 1962, adopted a resolution approving " 'The principle of voluntary family planning' and backed 'proper use of medically approved contraceptives that may contribute to the spiritual, emotional and economic welfare of the family.' "[33]

The Connecticut Council of Churches in December 1962 took like action. Its resolution said: "Christian marriage is a relationship of love and fidelity . . . [and] the sexual life within this relationship is given by God for the benefit of his children, and is neither an ethically neutral aspect of human existence, nor needs to be justified by the procreation of children."

b. *Jewish.* The position of the Reformed Jews is stated in a resolution passed by the 45th General Assembly of the Union of American Hebrew Congregations in 1959:

"a. We favor the elimination of all restrictions and prohibitions against the dissemination of birth control information and the rendering of birth control information and the rendering of birth control assistance by qualified physicians, clinics, and hospitals.

"b. We favor the wider dissemination of birth control information and medical assistance, both by pri-

[32] N.Y. Times, Feb. 24, 1961.
[33] New Haven Journal Courier, Oct. 11, 1962.

vate groups such as the Planned Parenthood Association, and health agencies of local, state, and the federal government as a vital service to be rendered in the field of public health."[34]

A similar view is taken by Conservative Jews, speaking through the Rabbinical Assembly:

> "Proper education in contraception and birth control will not destroy, but rather enhance, the spiritual values inherent in the family and will make for the advancement of human happiness and welfare."[35]

A minority Jewish group — the Rabbinical Alliance of America, representing Orthodox Jews — takes an intermediate position, approving the use of extrinsic aids to prevent conception under more limited circumstances:

> "The Rabbinical Alliance feels itself impelled to clarify the viewpoint of Orthodox Judaism on birth control practices, which we feel has been erroneously represented. Orthodox Judaism does not condone any artificial birth control measures by the male spouse, under any circumstances. Only in cases where the health of the female is jeopardized are certain birth control measures allowed and then only through direct consultation between the medical and rabbinic authorities."[36]

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[34] *Resolutions Passed by the 45th General Assembly, Union of American Hebrew Congregations* (1959), reprinted in Planned Parenthood Federation, *The Churches Speak Up On Birth Control* (1960).

[35] Quoted in Planned Parenthood Federation, *The Churches Speak Up On Birth Control* (1960).

[36] N.Y. Times, Aug. 12, 1958.

c. *Catholic.* The Catholic position is that the use of extrinsic aids to prevent conception is morally wrong.[37] There is serious doubt, however, that the majority of Catholics are willing to accept the Encyclical as representing their own private view of morality.

F. *The position of federal, state and local government.*

For many years the Federal Government has acted in a manner wholly inconsistent with any premise that the use of extrinsic aids to avoid conception is morally objectionable. Thus contraceptives have long been made available to members of the armed forces.[38] During World War II the War Production Board, whose function it was to allocate scarce commodities, promulgated regulations providing sufficient materials for the manufacture of contraceptives for men and women at 100 percent of the 1940-1941 production level.[39] Federally sponsored hospitals, available to personnel of the armed forces, provide contraceptive advice and care.[40] Recently the Department of Health, Education and Welfare announced that "Information on the prevention of pregnancy similar to that provided in the normal course of a doctor-patient relationship may be provided Indian beneficiaries of the Public Health Service."[41] In May of 1963 Federal funds were provided by Congress for a program of full birth control service in the District of

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[37] Vatican Encyclical on Birth Control, *Humanae Vitae*, Aug. 1968.

[38] See, e.g., Freedman, Whelpton and Campbell, *Family Planning, Sterility, and Population Growth* (1959), p. 177.

[39] War Production Board, Supplementary Order No. M-15-b, List C, issued January 24, 1942.

[40] See, e.g., letter in Army Times, Nov. 15, 1961.

[41] H.E.W., Public Health Service, Division of Indian Health, Circular No. 6 S-2, dated Jan. 21, 1963. See also H.E.W., A Survey of Research on Reproduction Related to Birth and Population Control, Public Health Service Publication No. 1066 (1963).

Columbia, available to all mothers delivered of a child at the District of Columbia General Hospital and to women qualifying for welfare assistance.[42] And in January of 1964 the Office of Economic Opportunity made a grant of funds to Corpus Christi, Texas, earmarked to provide birth control information and mobile birth control clinics.[43]

The pattern in state and local government is the same. The prescription and use of contraceptive devices, at least under some circumstances, is now lawful in all fifty of the states. More significant is the issue here, in many states and localities the government operates positive programs to make contraceptive devices available for persons desiring to use them.

Many local governments follow the same practice. In addition to Corpus Christi (supra), in New York City, under a Federal Grant (p. 58) totalling $1,462,718, five clinics operated for the city by cooperating hospitals have provided birth control advice and materials since October 1, 1964.[44] Health authorities in Dallas County, Texas, conduct free birth control clinics and send mobile units to dispense advice and contraceptives throughout the county.[45] In Dade County, Florida, the Public Health Department furnishes free contraceptive pills to welfare recipients.[46] The city authorities of Pasadena, California, distribute birth control information and supplies in low-income sections.[47]

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[42] Washington Post, Mar. 18, 1964; District of Columbia Government, Department of Public Health, Birth Control Program: Policies and Procedures Manual (May 1, 1964). In the first months of the program well over 1200 women received such care.

[43] N.Y. Times, Jan. 6, 1964. The Times reports that at least two other cities—Milwaukee and Washington—are seeking similar grants.

[44] N.Y. Times, Jan. 7, 1965. Two of the hospitals are Catholic and limit their techniques to the rhythm method. Other clinics are planned. Each clinic can handle about 1000 cases a year. *Ibid.*

[45] Edinburgh Valley Review, July 17, 1963.

[46] Miami, Florida Herald, Aug. 24, 1963.

[47] Washington Post, Mar. 10, 1963.

G. *Other manifestations of community opinion.*

It is hardly necessary to accumulate further data on this point. The following facts may, however, be noted:

The White House Conference on Children and Youth in 1960 adopted the following resolution:

> "We recommend that planning for the size of families is desirable in order to relieve the deprivation of children. Thus, facilities and programs on a local public or private basis should be available to married couples to provide medical advice and services for child spacing. These should be consistent with the creed and mores of the families served."[48]

The American Assembly, at its meeting in Harriman, New York, in 1963 recommended:

> "Assumption of responsibility by the federal, state and local governments for making available information concerning the regulation of fertility and providing services to needy mothers compatible with the religious and ethical beliefs of the individual recipients."[49]

In August 1964 the Republican Citizens Committee made public its Critical Issues Paper No. 12, recommending, inter alia:

> "That the United States Public Health Service provide appropriate leadership and assistance to state and local health departments in offering help to disadvantaged citizens in the regulation of birth by

[48] N.Y. Times, Jan. 24, 1960.
[49] N.Y. Times, May 6, 1963.

means which accord with their religious beliefs and individual preferences."[50]

The 1964 Convention of the Young Women's Christian Association adopted a resolution recommending support for the development of:

> "appropriate channels for the widest possible sharing of knowledge so that individuals and governments are enabled to obtain family planning information of such variety as to serve those of different creeds, mores and in different circumstances."[51]

Some 222 Planned Parenthood Federation birth control clinics are operating throughout the country.[52]

Our two living former Presidents — President Truman and President Eisenhower — served as Co-Chairman of the Honorary Sponsors Council of the Planned Parenthood Federation's 1965 Nationwide Campaign.[53]

H. *The Statutes are Irrational in Operation.*

The Massachusetts statutes operate in an irrational manner in at least four important respects:

(1) The statutes, so far as enforced, will always be applicable to married persons and seldom applicable to unmarried persons engaging in sexual relations. This paradox arises from the fact that

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[50] Critical Issues Council, *Resources and the Future Population* (Aug. 1964), p. 5.

[51] Adopted at 23rd National Convention, Cleveland, Ohio, Apr. 24, 1964 (mimeo release).

[52] For a listing of affiliates, see Planned Parenthood Federation, *Planned Parenthood Affiliates* (June, 1964).

[53] Planned Parenthood News, Fall, 1964, p. 1.

it is not unlawful for persons to use otherwise forbidden devices for the purposes of preventing disease although by so doing they also prevent conception.

(2) The statutes operate to discriminate against low income and uneducated groups of our citizens. The permission granted to married couples in § 21A does little to alleviate this problem and, in fact, can be considered to increase it. Section 21A in its proscription of advertising does little to enhance the dissemination of knowledge regarding contraceptive articles to those who most need it. The requirement in § 21A that even married persons must obtain a doctor's prescription and can purchase the otherwise prohibited article only from a pharmacist militates against availability to the poor. The application of the statute is therefore wholly arbitrary.

(3) Since the statutes are not generally enforced or enforceable, they can only be applied to individuals in an arbitrary fashion. No rational program for enforcement has been instituted or could be. The law is thus subject to the unfettered discretion of the prosecuting officials. It is open to use for the harassment of an unpopular citizen. It is not capable of rational administration. See *Davis* v. *Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949), Aff'd. 336 U.S. 933 (1949); *Goldstein, Police Description Not To Invoke The Criminal Process;* Low-Visibility Decisions in the Administration of Justice, 69 Yale L.J. 543 (1960).

(4) The statutes tend to produce an increase in the number of illegal abortions. While the evidence is not conclusive, there are many authorities who find a direct relation between the availability of

contraceptive services and the criminal abortion rate.[54] It stands to reason that the Massachusetts statutes, which cut off all public information and services on contraception, operate to accentuate this acute social problem. The law thus promotes the very kind of immorality it ostensibly is designed to limit.

I. *The Problem of Overpopulation.*

Population expansion poses a momentous problem for this country and the world today. The issue must be ranked as equal in importance to the questions of disarmament and peace, automation, poverty and civil rights.[55] Indeed population control is a part, and a significant part, of each of these burning problems.

We will not attempt to present in this brief the facts pertaining to the "population explosion." It is now fully apparent that the public welfare of the world, this nation, and all its constituent parts, requires immediate consideration of measures to plan and limit population growth. And any such program must obviously rely upon the use of scientific methods for preventing conception.

The Federal Government has recognized the problem and is actively seeking a solution. In December of 1962 United States policy was officially stated by Richard H.

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[54] See, e.g., Kleegman, *Planned Parenthood: Its Influence on Public Health and Family Welfare*, in Rosen, *Therapeutic Abortion* (1954), pp. 254-5; Calderone, *Abortion in the United States* (1958), pp. 111-3, 182; Whelpton, *The Abortion Problem*, in Williams, *The Sanctity of Life and the Criminal Law* (1957), p. 211.

[55] Note the statement of the National Academy of Sciences: "Other than the search for lasting peace, no problem is more urgent." *The Growth of World Population*, Publication No. 1091 of the National Academy of Sciences, National Research Council (Wash., D. C., 1963), p. 2.

Gardner, Deputy Assistant Secretary of State for International Organization Affairs, speaking to the United Nations:

> "In the opinion of my Government progress toward [the] high aims of the United Nations Charter cannot be measured merely by increases in gross national product. The object of economic development is the welfare and dignity of the individual human beings.
>
> "If the condition of the individual, and not gross statistics, is to be the measure of our progress, then it is absolutely essential that we be concerned with population trends. .... So long as we are concerned with the quality of life we have no choice but to be concerned with the quantity of life.
>
> "We believe these statements are true not just for some but for all nations. . . . .
>
> "Within the United States our local, state and federal governments are all devoting attention to population trends as part of their planning for the improvement of individual welfare."[56]

President Kennedy supported these developments. Thus in a speech on June 5, 1963, calling for solution of the problem of hunger in the world, he made clear the interest of this country when he said, "Population increases have become a matter of serious concern."[57]

And President Johnson, in a significant and much noted passage in his State of the Union Address in 1964, emphasized that additional action was necessary and would be taken:

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[56] U. S. State Department Bulletin, Vol. XLVIII, No. 1228, Jan. 7, 1963.

[57] N.Y. Times, June 5, 1963.

> "I will seek new ways to use our knowledge to help deal with the explosion in world population and the growing scarcity of world resources."[58]

We submit the evidence is overwhelming that, at least as of 1971, the use of extrinsic aids, per se, to avoid conception, cannot be held contrary to the prevailing morality of the community. The acceptance of such practices by general public opinion, by virtually the entire medical profession, by the bulk of religious groups, by respected organizations and individuals, and especially the encouragement to utilize such devices on a widespread scale by all levels of government itself — render any other conclusion impossible.

We are confronted then with an acute world-wide problem that is pressing for immediate solution. That solution must involve, as a major element, the voluntary use of contraceptive devices to limit the number of children born. Viewed in this context, in the light of world opinion and world needs, the contrary judgment of the Massachusetts statutes, left-overs from a by-gone era, can have little standing.

Conclusion

Some may feel, as the Commonwealth has suggested, that the problems recited herein are not as acute as suggested or that our legislative process is the sole and proper machinery for effective relief. Such complacency and ready answer in unjustified.

The legislative process has not only failed to respond, but has capriciously and arbitrarily ignored what empirical evidence indicates the problems of the community

[58] 111 Cong. Rec. 27 (daily ed., Jan. 4, 1965).

to be. People are dying — the unwanted child (in many cases uncared for), is running amuck in the ghetto — and the cost to the community is staggering.

These statements are, of course, headlines with which we seek to emphasize the defendant's point of view. We do not intend to over-simplify the complex factors that are involved, but these are the facts to buttress our point of view. If this Court accepts them, there should be no reluctance to conclude that judicial disapproval and forthwith denouement is required to remove that which violates due process of law.

For all other reasons stated the Appellee respectfully urges that the Judgment of the Court of Appeals declaring the Massachusetts anti contraception law unconstitutional by affirmed in all respects.

Respectfully submitted,

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